BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY FOR AN INCREASE IN BASE RATES AND MISCELLANEOUS TARIFF CHANGES (Filed May 17, 2016)	)))))	PSC DOCKET NO. 16-0649

THE DELAWARE DIVISION OF THE PUBLIC ADVOCATE'S OPPOSITION TO THE PETITION OF THE COMMISSION STAFF FOR AN INTERLOCUTORY APPEAL

The Delaware Division of the Public Advocate ("DPA") hereby opposes the Petition of the Commission Staff for an Interlocutory Appeal to the Commission (the "Petition") as follows:

1. The Petition attacks the Hearing Examiner's ("HE") decision to prevent Staff from hijacking a settlement agreed to by three of the four active parties – Delmarva Power & Light Company ("DPL"), the DPA, and the Delaware Energy Users Group ("DEUG") ("Settling Parties"). Staff claims that its Petition must be addressed now because "time is of the essence." (Petition at 5) The only reason time is of the essence for Staff is because it stuck its head in the sand. Staff knew that DPL, DPA and DEUG were negotiating; it received a term sheet outlining the settlement's terms two weeks before the hearing; and it received the complete text of the settlement over a week before the hearing. Parties in multimillion dollar corporate preliminary injunction cases conduct discovery, file pre-trial briefs, try the case, and submit post-trial briefs in less time than Staff has had to prepare to oppose a settlement in which most of the issues are black-boxed.[1] Staff's own foot-dragging does not turn this matter into one requiring immediate attention.

2. The real issue is that Staff opposes the settlement. But the law does not require Staff's support, nor does it require a hearing where the Settling Parties are forced to present their cases as if the settlement did not exist. Stripped of hyperbole, Staff's argument is that *it* is *the* most important party in a case and no case can *ever* settle unless *Staff* agrees.[2] But 26 *Del. C.* §512 specifically: (a) encourages settlements; (b)

[1]Indeed, Staff told the HE on February 27 that it was prepared to litigate a fully-contested case. If Staff had spent less time complaining about the HE's decision and preparing this Petition, it would be prepared to contest the settlement.
[2]During the February 27 teleconference held after the Settling Parties had moved to convert the hearing to a settlement hearing, Staff told the HE that the cases cited in the Motion were inapposite because, among other reasons, Staff was a party to all of those settlements.

provides that after a hearing, the PSC may approve a settlement if it is in the public interest *even if the settlement is non-unanimous*; and (c) states that Staff *may* (but does not have to) participate in settlements.

3. Staff complains that it is being denied due process. (Petition at 1, 4, 5) "'Due process as it relates to the requisite characteristics of the proceeding s entails providing the parties to the proceeding with *the opportunity to be heard*, by presenting testimony or otherwise, and *the right of controverting*, by proof, every material fact which bears on the question of right in the matter involved in an *orderly proceeding appropriate to the nature of the hearing and adapted to meet its ends*.'"[3]

4. The required Section 512 hearing is taking place. The Settling Parties will present evidence and testimony supporting the settlement and, importantly, *in which the Settling Parties bear the burden of proving that the settlement is in the public interest*. Staff can cross-examine those witnesses and challenge that evidence.[4] Staff will then present its case. Staff has the opportunity to be heard; it has the opportunity to present testimony; and it has the right to controvert the evidence produced by the Settling Parties. That is all the process that is due.

5. To understand how Staff created its own problem, some background (that Staff omitted) is necessary. On December 12, 2016, the parties met to discuss settlement, but reached no agreement. On January 4, 2017, the parties met again. DPL and the DPA brought representatives with settlement authority. Staff did not: the PSC's Executive Director ("ED"), who has settlement authority, was absent, and Staff's representatives said that they did not have authority to make a settlement offer.[5]

6. Although the parties did not physically meet again after January 4, they continued to negotiate. And Staff knew this: at the NARUC conference (February 11-15, 2017), the DPA spoke to the ED several times about the negotiations. The ED told the DPA that Staff was done negotiating, and that the DPA should

[3]*See Bell Atlantic-Delaware v. Public Service Commission*, 705 A.2d 601, 605 (Del. Super. 1997) (internal citation omitted) (emphasis added).

[4] A review of the proposed witness and exhibit lists identifies all of the Delmarva witnesses who have filed prefiled testimony, and a witness for the DPA and his pr4efiled testimony. The only person to have submitted prefiled testimony not identified on the witness and exhibit lists is DPA witness Michael Gorman, who the DPA is not calling and whom Staff has subpoenaed. That is the subject of a motion to quash pending with the HE.

[5]Staff complained that it had not received DPL's offer until 9:00 the night before the meeting. The DPA also did not receive the offer until that time, but it came prepared to settle if it was possible.

go ahead on its own if it wanted. Thus, three weeks prior to the hearings, Staff was aware that the DPA might continue to negotiate with DPL and might reach a settlement. That is exactly what happened: DPL and the DPA reached agreement on a revenue requirement increase; the DPA and DEUG reached agreement on the revenue distribution; and all Settling Parties agreed to execute a settlement agreement.

7. After DPL and the DPA hammered out the final revenue requirement terms, DPL forwarded a term sheet to Staff on February 21 at 1:57 p.m. (two weeks before the hearings).

8. On February 24, DPL notified the HE that the Settling Parties would submit a motion to convert the evidentiary hearing to a settlement hearing ("Motion"), and they did so on February 27. Later that day, the parties orally presented their positions to the HE. The Settling Parties described how they envisioned the hearings: they would sponsor a witness to testify that the settlement was in the public interest; Staff could cross-examine those witnesses; Staff would put on its case, and its witnesses could be cross-examined. DPL and the DPA stated repeatedly during the teleconference that the *Settling Parties* bore the burden of proving that the settlement was in the public interest.

9. Staff filed its opposition to the Motion. On February 28, the HE issued an order adopting the Settling Parties' proposed procedure. However, he also expressly reserved the right, after Staff presented its case, upon request, to allow any other party to offer evidence; issue witness subpoenas; and continue the hearing for a witness to appear. (Order No. 9033, Paras. 1-3). He directed the Settling Parties to provide the fully-executed Settlement Agreement to Staff on March 1. On February 28, DPL provided Staff with the settlement and an explanatory email. (Ex. A).

10. Staff contends that there will be two hearings: a settlement hearing and an evidentiary hearing. (Petition at 3). Staff seems to deliberately misunderstand what the HE did. There will be *one* evidentiary hearing, at which the Settling Parties will present their evidence that the settlement is in the public interest (and will bear the burden of proof), and Staff will present its case to try to persuade the HE and the PSC that the settlement is *not* in the public interest. This is no different than any other contested settlement, so how does this translate into two different hearings? And how is the HE or the PSC going to reach two different results? Either the Settling Parties prove that the settlement is in the public interest, or they do not.

If the HE or PSC concludes that the settlement is not in the public interest, then the settlement is null and void: the parties go back to their respective litigation positions, and Staff gets its fully-litigated hearing.[6] Staff is making this more complicated than it is. But that is the only way it can support its position.

11. Staff's contention that the settlement is an "entirely new case" (Petition at 4) is nonsense. Under that logic, every time a rate case settles, even if it is unanimous, a utility would have to file a new application for the settlement rate increase. Why would a utility ever want to settle?

12. Staff's assertion that the HE's procedure shifts the burden of proof is equally illogical. A settlement's proponents always bear the burden of proof, just as the utility always bears the burden of proof in a litigated rate case. But in a rate case, unless another party challenges the utility's evidence, the utility is probably going to meet its burden. There are uncontested issues in many litigated rate cases. When has a HE or a Commission ever found that the utility did not meet its burden of proof on those uncontested issues? We daresay never. Staff will have to present some evidence to give the HE and the Commission a reason to find that the settlement is not in the public interest, and we expect that is what it will try to do by introducing its testimony through its witnesses and cross-examining the Settling Parties' witnesses.

13. Finally, Staff's claim that it represents ratepayers who are being deprived of due process (Petition at 1,4,5) is, quite simply, wrong.[7] Nowhere in the Public Utilities Act (or anywhere in the Delaware Code, or even the PSC's own regulations) is Staff charged with representing ratepayers. This is a power that Staff has arrogated to itself.[8] The fact is that the DPA has the authority to represent all ratepayers. 29 *Del. C.* §8716(e) charges the DPA with "advocat[ing] the lowest reasonable rates for consumers consistent with

[6] That will cost the ratepayers (about whom Staff claims to care so much) hundreds of thousands of dollars. Indeed, Staff's behavior has already caused DPL to incur thousands of dollars in attorneys fees, including Staff's counsel's fees. But that apparently is acceptable to Staff as long as it gets its way.

[7]Staff insinuates that the DPA seeks to quash Staff's subpoena to Mr, Gorman because he would testify that the proposed settlement is not in the public interest. (Petition at 4 n.16). The DPA opposes Staff's subpoena because it does not want to incur the expense of bringing another witness that will repeat the same testimony that Mr. Watkins will give: that the settlement is in the public interest. Lest there be any doubt, the DPA assures the PSC that if forced to appear, Mr. Gorman will testify that the settlement is in the public interest.

[8]Indeed, Staff does not even have to participate in rate cases. The PSC's regulations define "Staff" as "full-time professional employees of, and outside counsel and consultants retained by, the … [PSC] who render advice to the [PSC]. The Staff *may* participate in any [PSC] proceeding and *may* advocate particular positions concerning the issues raised in such proceeding and file supporting material and testimony for the [PSC's] consideration." (Emphasis added) Staff's role, as defined by the PSC itself, is to advise the PSC, not to represent ratepayers.

the maintenance of adequate utility service and consistent with an equitable distribution of rates *among all classes of customers*; provided, however, that the [DPA] shall *principally* advocate on behalf of residential and small commercial consumers and shall not be required to advocate for any class of commercial or industrial customers that the [DPA] determines … has the ability to advocate on its own behalf … ." (emphasis added). Staff ignores the beginning of the DPA's enabling statute – which clearly directs the DPA to consider the interests of *all* consumers – because that language belies Staff's contention.

14. The DPA and DEUG have actively participated in this proceeding and have concluded that the settlement is in their constituents' interest. The DPA respectfully asks: what ratepayers are not fairly represented in the settlement?

15. Staff has had sufficient time to prepare for a hearing. Indeed, if it has already been preparing for a fully litigated hearing, as it said in its response to the Motion, then how does it need more time? It has had the term sheet for two weeks. The only thing that changed in the settlement was the addition of agreements regarding revenue distribution (which is different from what Staff proposed, so Staff would have been preparing to contest that anyway) and the monthly residential customer charge (which is also different from what Staff proposed, so Staff would have been preparing to contest that as well). Staff will have the opportunity to examine the witnesses that the Settling Parties present to defend the settlement, should it so choose. Due process does not require the Settling Parties to submit new testimony, nor does it require them to bring every witness that filed prefiled testimony to the hearing.

16. The Public Utilities Act specifically provides for non-unanimous settlements to which Staff need not be a party. If Staff does not like Section 512, its remedy is to persuade the General Assembly to change it, not to derail long-scheduled hearings to which out-of-town witnesses are traveling. Staff's Petition fails on both the law and the facts. It should be denied.

Dated: March 6, 2017

/s/ *Regina A. Iorii*

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